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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 431

FORD MOTOR COMPANY,
Complainant and Appellant

against

CHESTER R. PACE, ET AL.,
Defendants and Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL

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Dated: October 28, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

FORD MOTOR COMPANY, *Complainant and Appellant,* —*against*— CHESTER R. PACE, ET AL., *Defendants and Appellees.*	Docket No. 431

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF IN OPPOSITION TO MOTION TO DISMISS THE APPEAL

The Appellees having moved to dismiss the appeal in this cause pursuant to Rule 16, on the ground that the appeal does not present a substantial Federal question, said motion being dated October 10, 1960; and having been served upon appellant on October 11, 1960, appellant respectfully submits as follows in opposition to said motion:

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

As indicated in the "Preamble" (Motion, p. 2), Appellees' motion proceeds upon the assumption that the prevalence of regulation by states of the sale of motor vehicles under the police power sustains the validity of the "similar" Tennessee act. Both the factual premise and the logic of the conclusion are fallacious.

The statutes of the states referred to by Appellees (M., p. 2) are not similar. None of them establishes a tribunal whose members must be drawn from a list submitted by a private group of automobile dealers to adjudicate manufacturer-dealer disputes, as does § 59-1703 of the Tennessee Act.

The Michigan statute* does not regulate manufacturer-dealer relationships at all. Although the statutes** in the other states referred to by Appellees (M., p. 2) contained provisions dealing with manufacturers, Appellees cite only two cases (*Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N. W. 2d 420 (1955) and *E. L. Bozeen Co. v. American Motor Sales Corp.*, 153 F. Supp. 42 (E. D. Va. 1957)) involving those provisions. The *Kuhl* and *Bozeen* cases upheld provisions limiting termination of dealer franchises. But in neither of these cases did the court pass upon the issues presented here of (a) invalidity of a tribunal composed of and selected by dealers to adjudicate manufacturer-dealer disputes, (b) undue burden upon interstate commerce, and (c) retroactive impairman of contractual rights to effective sales representation in violation of the Contract Clause.

In every other case*** cited by Appellees involving a state statute, the court was concerned only with the licens-

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*8 Mich Stats. Ann. §§ 9.1948-9.1951.

**Wis. Stats. Ann. § 218.01 et. seq.; Code of Va. § 46.1-523, 547; Colo. Rev. Stats. Ann. § 13-11-1 et. seq.; Fla. Stats. Ann. § 320.60 et. seq.; Okla. Stats. Ann. 47 § 563 et. seq.; Code of S. Dak. § 44.0211.

Although Appellees refer to Colorado, they fail to cite *General Motors Corp.* v. *Blevins*, 144 F. Supp. 381 (D. Colo. 1956), in which the provisions of the Colorado statute purporting to regulate manufacturers were held invalid. No appeal was taken from that decision.

***In *Ohio Motor Vehicle Board* v. *Memphis Auto Sales*, 103 Ohio App. 347, 142 N. E. 2d 268 (1957), cited by Appellees (M., p. 2) the court *struck down* a statutory requirement that in order to lawfully sell new vehicles a dealer must be franchised by a manufacturer, relying upon the similar holding in *Nelson* v. *Tilley*, 137 Neb. 327, 289 N. W. 388 (1939). The portions of that opinion quoted by Appellees (M., p. 2) related only to licensing of dealers to promote law enforcement. *Louisiana Motor Vehicle Comm'n* v. *The Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958) upheld provisions prohibiting the sale and registration of vehicles as new and unused except by licensed and franchised dealers. *Miller Motors Co.* v. *Ford Motor Co.*, 149 F. Supp. 790 (M. D. N. C. 1957) cited by Appellees (M., p. 3) was a suit under the Federal anti-trust laws and involved no state statute having any relation to the Tennessee Act whatever.

ing of motor vehicle dealers. Those cases obviously have no application here.

Furthermore, as this Court has repeatedly pointed out, a State cannot avoid the operation of constitutional guarantees "* * * by simply invoking the convenient apologetics of the police power." *Morgan* v. *Virginia*, 328 U.S. 373, 380 (1946), quoting *Kansas City Southern R. Co.* v. *Kaw Valley District*, 233 U.S. 75, 79 (1914) (in the context of the Commerce Clause). Here, substantial Federal rights under the Due Process Clause, the Commerce Clause, and the Contract Clause are infringed by the statute under review.

I. THE QUESTIONS PRESENTED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ARE SUBSTANTIAL.

Biased Character of the Commission

In an effort to overcome the biased nature of the tribunal established to adjudicate manufacturer-dealer disputes, Appellees assert (M., p. 4) that "by the express terms of the Act" (§ 59-1703), manufacturers, as well as dealers, would be eligible to serve on the Tennessee Motor Vehicle Commission *"if requested"*. But the statute does not so provide; indeed, the specific provision of § 59-1703 is to the contrary. Eligibility is expressly limited to candidates selected from a list submitted by the Tennessee Automotive Association, a private group of automobile dealers (See Appendix L to Statement as to Jurisdiction, p. 58a). Eligibility by request of the candidate is foreclosed.

Even apart from the contrary wording of the statute, it would have been idle for Appellant to have made a request to this Association for the inclusion of a representative number of, or indeed any, manufacturers on the Commission. The Association has regarded its obligation under the statute

to be the submission of a list composed exclusively of dealers. (Appendix M to Statement as to Jurisdiction *passim*). In accord is what the Motion to Dismiss (p. 4) calls an "isolated sentence" from the Opinion of the Court below, which reads:

> "A rather vicious attack is made upon the Section of the Act (59-1703) *which makes* the Commission consist solely of dealers who are selected by the Governor from a list submitted by the Tennessee Automotive Association * * *" (emphasis added).

The context (Appendix A to Statement as to Jurisdiction, p. 12a) shows that this was the construction and interpretation of the statute upon which the Court below proceeded.

It is futile to conjecture whether, despite every outward appearance of prejudice, it would be possible for a tribunal composed exclusively of dealers, and primarily of franchised new car dealers, to be in fact objective and impartial in the adjudication of disputes between automobile manufacturers and dealers.

First, actual prejudice on the part of the Association is revealed its resolutions (see Appendix M to Statement as to Jurisdiction, p. 68a); the prejudice of the Hearing Examiner is evident from his testimony.*

Second, due process is not satisfied by any conjecture as to whether the tribunal, despite outward appearances, might in fact be impartial. As stated by this Court in *In re Murchison*, 349 U. S. 133, 136 (1955): "* * * to perform its high function in the best way, 'justice must satisfy the appearance of justice' *Offutt* v. *United States*, 348 U. S. 11, 14."

Appellees attempt (M., p. 5) to justify the creation of a biased tribunal under the Tennessee statute by analogy to regulatory boards for the self-government of various

*Appendix K to Statement as to Jurisdiction, p. 56a.

professions, such as law and medicine. But the analogy is false. The regulation here under attack is not *self government* by either manufacturers or dealers. Instead, it is regulation *of manufacturers by dealers* on matters in which the dealers' interests are in conflict with those of both manufacturers* and consumers.

Indeed, as recognized by the Association (Appendix M to statement as to jurisdiction, p. 68a), the primary function of the Commission is the adjudication of disputes between manufacturers and dealers. This makes applicable the principles stated by this Court in *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960): "* * * When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have been traditionally associated with the judicial process * * *." Those procedures include the right to a tribunal which is impartial and furthermore satisfies the appearance of justice.

The limited judicial review provided by the Tennessee statute is plainly inadequate to assure due process because such review cannot protect against bias for two reasons:

First, the statutory review is not on the merits. Instead, as Appellees must admit (M., p. 6, footnote), the reviewing court merely "* * * reviews the evidence and determines whether the Commission has acted *beyond its jurisdiction* or has acted *arbitrarily, fraudulently or illegally*." (emphasis added).

Second, as this Court pointed out in *Berger* v. *United States*, 255 U. S. 22, 36 (1921) and recognized in *Pennsyl-*

*That there are differences of opinion between manufacturers and dealers concerning the traditional disputes between them is a well accepted fact of common knowledge. See Appendices F, I, and K to Statement as to Jurisdiction; Palamountain, *The Politics of Distribution*, 148, 151 (1955); Kuss, *A Theoretical Note on the Dealer-Manufacturer Relationship in the Automobile Industry*, 73 Q. J. Econ. 316 (1959).

vania R. Co. v. Rychlik 352 U. S. 480, 496 (1957), even a full judicial review on the merits—indeed any form of appeal—is inadequate to correct bias on the part of the original tribunal in an adjudicatory proceeding.

In *Long Island Water Supply Co. v. City of Brooklyn*, 166 U. S. 685 (1897), cited by appellees (M., P. 7), no claim of probability of bias on the part of the commissioners was involved.*

For these reasons, the biased nature of the Commission violates the standards set forth in the decisions of this Court cited in the Statement as to Jurisdiction (pp. 12-15) and presents a substantial Federal question.

Vagueness of Statutory Standards

The vagueness of the statutory standards also presents a substantial Federal question.

The words "unfairly, without due regard for the *equities of said dealer* and without just provocation" in § 59-1714(h)(4) (emphasis added) have no natural and ordinary meaning which gives Appellant guidance as to when termination or failure to renew a dealer's franchise is a cause of revocation of its license to do business in the State.

There is also no forseeable limit to the application of the terms "coerced *or attempted to coerce*" a dealer to order

*The kind of situation, not present here, where review may cure defects in the proceedings below is illustrated by *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126 (1941), not cited by Appellee. There the action of an industry committee as to minimum wages was merely advisory and dealt with a formulation of *general standards or rules*, rather than adjudication of specific cases and the imposition of adverse legal consequences as here. On review, an impartial Administrator had complete discretion to accept or reject the recommendations of the committee on the basis of his own independent judgment after his own full investigation and hearing on the merits, which is absent here. In *R. H. Johnson & Co. v. SEC*, 198 F. 2d 690, 695 (2d Cir. 1952), cert. denied, 344 U. S. 855 (1952), also not cited by Appellee, the tribunal was not biased and the review was plenary and on the merits, and further, no governmental sanctions could be imposed by the tribunal. See 15 U. S. C. § 78o-3; Loss, *Securities Regulation* 769-70 (1951).

"any" vehicles not "voluntarily" ordered under § 59-1714(g)(1) (emphasis added). Even "salesmanship" might constitute coercion in this context. The vagueness of this statutory provision is brought out by the sharp contrast with the Federal Automobile Dealers Franchise Act which specifically provides that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 15 U. S. C. § 1221(e).

The impact of the vagueness of these provisions is aggravated by the biased nature of the tribunal and the severity of the penalty which it is authorized to impose.

II. THE QUESTIONS PRESENTED UNDER THE COMMERCE CLAUSE ARE SUBSTANTIAL.

Examination will show that each of the provisions of the statute defended by Appellees in the Motion to Dismiss imposes an undue burden upon interstate commerce, and that the statute restricts the volume of interstate commerce in order to grant a preferential position to local economic interests, in violation of the purposes of the Commerce Clause and in conflict with the policies of the Federal antitrust laws.

Subsection (g)(1): Affirmative Sales Effort May Not Be Required of Dealers

The franchised automobile dealer secures important advantages from his dealership. The dealer is enabled to buy new automobiles at a price less than that charged to the general public; his authority to use the name of the manufacturer imposes a practical limitation on the manufacturer's ability to attract other dealers to do business in the same area if necessary to promote sales. In return for these advantages, the dealer undertakes actively

to promote sales within his area. (See Appendix P to Statement as to Jurisdiction, p. 81a).

The manufacturer is solely dependent on the dealer for effective sales representation. Yet § 59-1714(g)(1) makes it a cause of license revocation for a manufacturer to "coerce" a Tennessee dealer to order or accept "any" vehicles not "voluntarily"* ordered.

Appellees contend that (g)(1) deals only with "coercion" which "has always been abhorred in the law of contracts". (M., p. 9) But the impact of "coercion" depends upon the circumstances. Here, (g)(1) precludes the manufacturer from requiring a Tennessee dealer to order "any" vehicles not "voluntarily" ordered, in spite of the fact that the dealer has agreed under his franchise to order sufficient vehicles to carry out his obligation to represent the manufacturer. The Tennessee dealer is thus freed from his return obligation to promote sales and provide effective representation for the manufacturer,** thereby imposing a severe restriction upon interstate commerce.

Subsection (h)(1): All Advertised Vehicles Required to Be Delivered Within 60 Days of Order

Subsection (h)(1), requiring the manufacturer to deliver within 60 days any vehicle ordered by a Tennessee dealer which is publicly advertised for immediate delivery, would require motor vehicle manufacturers to disrupt nation-wide methods of distribution, thereby imposing an undue burden upon interstate commerce.

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*The statute of no State referred to by Appellee (M., p. 2) has been found containing this language nor committing its enforcement to commissioners drawn from a list submitted by a private group.

**An analogy would be the situation of an employer required to continue employees on his payroll and to give them all the work they might desire (compare § 59-1714(h)(1)) but unable to require them to do "any" work which they did not "voluntarily" decide to do (compare § 59-1714(g)(1)), and unable to terminate his relationship with them for lack of performance (compare § 59-1714(h)(4)).

National motor vehicle advertising can not state the length of time required for delivery for each vehicle ordered. Obviously, some vehicles are available for immediate delivery at the beginning of a season; more become available as manufacture progresses. In order to sell these vehicles, and to begin the distribution of a new model, it is essential that advertising show that some vehicles are available. The advertising contains no misrepresentation, there being no expressed or implied statement that every customer may receive the vehicle ordered by him with no waiting period.

Subsection (h)(4): Termination For Lack of Performance A Cause of License Revocation

Subsection (h)(4) makes it a cause for license revocation for a manufacturer to fail to renew a franchise or selling agreement "without just provocation". In conjunction with (g)(1) (making it clear that a manufacturer cannot require a dealer to "order or accept delivery of any motor vehicle" not "voluntarily" ordered), this precludes the manufacturer from insisting that a dealer make any affirmative sales effort as a condition to renewal or continuance of his franchise. The reference to "equities of said dealer" in subsection (h)(4) tends to restrain interstate commerce by freezing existing channels of distribution. Reference to "equities" of the dealer was deleted from the bill which became the Federal Act in order to avoid any interpretation inconsistent with antitrust principles. (See Statement as to Jurisdiction, p. 23-25).

Subsection (h)(6): Facilities Required Prior to Franchise

Subsection (h)(6) does not merely seek to insure that a franchised dealer have adequate facilities after he is appointed; it requires adequate facilities (as judged by the Commission composed of existing dealers) *"at the time of the franchise agreement"*. (emphasis added) This severely

restricts the opportunity for new dealers to enter the field, because it would be extremely risky to invest in new facilities before knowing (a) that a franchise would be granted by the manufacturer, and (b) that the Motor Vehicle Commission composed of existing dealers would grant a license to the new competitor under § 59-1711, which requires information, even before the license is granted, relating to "* * * whether the applicant has an established place of business and is primarily engaged in the pursuit, advocation or business for which a license is applied * * *". (emphasis added). This prejudices Appellant by restricting its opportunity to secure new dealers if the existing dealers, shielded by § 59-1714(g)(1), fail to provide effective sales representation.

The Burden Upon Commerce And Repugnance to Federal Antitrust Policies

State regulation of interstate commerce which imposes so severe a burden upon interstate activities without clear necessity to do so to protect local needs has been subjected to exacting judicial scrutiny under the Commerce Clause, even though the burden does not take the classic form of protecting local products from competition by out-of-state products. This is exemplified by such cases as *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520 (1959) (state truck mudguard requirements differing from those of other states so as to impose severe burden); *Morgan* v. *Virginia*, 328 U. S. 373 (1946) (state requirement for separation of seating in interstate transportation on basis of race); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945) (state limit upon length of trains engaged in interstate journeys); *Edwards* v. *California*, 314 U. S. 160 (1941) (interstate movement of persons restricted for local economic reasons). The present case is analogous to these cases because, like them, it concerns the arteries or gateways through which commerce must flow.

Sales to dealers are the channels of interstate distribution through which appellant's interstate commerce must flow on the way to ultimate consumers in Tennessee. See *Howell Chevrolet Co. v. NLRB*, 346 U. S. 482 (1953).

Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U. S. 329 (1951), cited by Appellees (M:, p. 11), merely held that the State could require that interstate gas sales be channeled through a state-licensed utility. A contrary holding would have permitted the interstate pipeline to refuse to deliver gas to the local utility and, instead, run duplicating pipes under the streets of the locality against state wishes, resulting in higher total costs and higher ultimate charges to the consumer.

There was no issue concerning restriction of the volume of commerce in *Panhandle*. The local utility was prepared to distribute as much gas as the interstate pipeline itself:

> "* * * There is no intimation that appellant cannot deliver and sell available gas to [the local certificated utility] for resale to customers who have additional gas requirements * * *". 341 U. S. at 336.

Here, by contrast, one of the chief functions of the dealer is the active solicitation of business; yet § 59-1714(g)(1) makes it a cause for license revocation for appellant to insist that its distributors accept or purchase and sell "any" vehicles which are not "voluntarily" ordered. The Tennessee statute delegates to the dealer complete control of the volume of interstate commerce which he may be required to seek to generate, at the same time limiting entry into the field. It thus permits the dealers to determine the volume of interstate commerce so as to maximize their own return, in effect acting as a tollgate across the arteries of interstate distribution.

This is not regulation by the state in the interest of the public as in *Panhandle*. It is state-authorized regulation by

dealers in the interest of dealers and to the detriment of the public.

Even beyond this, the administration of the entire statutory scheme is committed to a body drawn from a list submitted by a private group of existing dealers.

Here, as in *Associated Press* v. *United States*, 326 U. S. 1, 19 (1945), *Fashion Originators Guild* v. *FTC*, 312 U. S. 457, 465 (1941), and *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 242 (1899), a private body has assumed power to regulate interstate commerce which "* * * trenches upon the power of the national legislature * * *".

The result, which is comparable to the medieval guild system of industrial regulation, constricts the volume of interstate commerce in order to grant a preferential position to local economic interests as in *Hood & Sons, Inc.* v. *Du-Mond*, 336 U. S. 525, 530-39 (1949), *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511 (1935), and *Buck* v. *Kykendall*, 267 U. S. 307, 316 (1925).*

There are limits to the extent to which a state may authorize private conduct otherwise forbidden by the Federal antitrust laws. These limits are transgressed here by the vast powers conferred upon a Commission whose members must be drawn exclusively from a list submitted by a private group. The situation is comparable to *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 386

*Appellees quote (Mo. p. 34) the statements of this Court that "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *(Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483, 488 (1955), quoting *Munn* v. *Illinois*, 94 U. S. 113, 134 (1876)), but they overlook that, as pointed out by Chief Justice Stone in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767-68 n. 2 (1945):

> "* * * the Court has often recognized that to the extent that the burden of State regulation falls on interests outside the State, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the State are affected [citing many cases]."

(1951), where this Court said "* * * The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress."

In the *Parker* case there were "* * * no opposing directives and hence no necessity * * * to resolve any conflicting claims as between state and federal regulation." 341 U. S. at 330. By contrast, in this case, the Federal Automobile Dealers Franchise Act of 1956 provides (15 U.S.C. § 1224) that "No provision of this chapter shall repeal, modify, or supersede, *directly or indirectly*, any provision of the antitrust laws of the United States." (emphasis added). The Tennessee statute is in "direct conflict" (See 15 U.S.C. § 1225) with this reaffirmation of antitrust principles, a reaffirmation which together with the national policies declared in the Sherman Act is most pertinent to the balancing of the conflicting local and National interests involved under the Commerce Clause, as is shown by the weight accorded to relevant federal statutes in the Commerce Clause cases of *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960), *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 773 (1945) and *Parker* v. *Brown* 317 U. S. 341, 367 (1943).

III. THE QUESTION PRESENTED UNDER THE CONTRACT CLAUSE IS SUBSTANTIAL.

This Court has said that "* * * Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process. * * * As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. * * *" *Ullmann* v. *United States*, 350 U. S. 422, 428 (1956). If the Contract Clause of Article I, § 10 retains any effective meaning, it must at least prohibit retroactive impairment of contractual obligations by a state statute designed to aid the interests of one contracting party at the expense of the other, where this is not justified by any emergency or

other overriding public interest. This is the criterion laid down in *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 108-09 (1938).

Under his franchise agreement (Appendix P to Statement as to Jurisdiction, p. 81a), the complaining dealer assumed the obligation to provide effective sales representation, and further agreed that the manufacturer should have the right to terminate the relationship in the event of the dealer's failure to do so.

As demonstrated in the Statement as to Jurisdiction, and in this Brief, the Tennessee statute (§ 59-1714(g)(1), (h)(4)) retroactively impairs the obligation of both of these franchise provisions. It relieves the dealer of his obligation to order enough vehicles to provide effective representation. It deprives the manufacturer of his right to terminate relations with a non-performing dealer.

CONCLUSION

Appellant respectfully submits that the Federal questions presented by this appeal are substantial, that Appellees' motion to dismiss should be denied and that probable jurisdiction should be noted.

Respectfully submitted,

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